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No. 02-376

Supreme Court, U.S.
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In the
Supreme Court of the United States

BRIAN VICTOR MYRLAND AND
MARK ROBERT NORLANDER,

Petitioners,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF MINNESOTA COURT OF APPEALS

PETITIONERS' REPLY BRIEF

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STATEMENT

This reply brief is submitted to address new points raised by the Respondent.

ARGUMENT

I. RESPONDENT INCORRECTLY ASSERTS THAT THE ADOPTION OF PETITIONERS' ARGUMENTS WILL INVALIDATE ALL AFFIRMATIVE DEFENSES.

Respondent mistakenly claims that "Petitioners assert that a defendant should never be required to shoulder the burden of production on an affirmative defense, arguing that it violates the Due Process Clause. The Petitioner's cite no applicable case law in support of their position. If the Petitioner's arguments were adopted, all affirmative defenses would violate the Due Process Clause." (Respondent's Brief in Opposition to Writ of Certiorari, p, 7-8)

Respondent misstates Petitioners' argument. Petitioners argue that the burden of production may not be shifted to the defendant on an *element* of the crime by labeling the element an affirmative defense. An affirmative defense may require the defendant to carry that burden when the affirmative defense *collaterally negates* the element. Respondent fails to distinguish between affirmative defenses, which incidentally negate elements, from the affirmative defense in the present case, which shifts the burden on the element itself. In other words, using Respondent's reasoning, there would be no constitutional distinction between an

affirmative defense that requires a murder defendant to make a prima facie case disproving the element of intent to kill, and an affirmative defense that requires a murder defendant to make a prima facie case of duress, which collaterally disproves the element of intent to kill.

Respondent engages in the same faulty analysis followed by the court of appeals and misstates the issue from the cases cited. Respondent cites the following language from a series of cases for the proposition that the burden of production may be shifted to the defendant on an *element* of the crime: "if the mitigating circumstance or issue [contained in the affirmative defense] disproves or negates an element of the crime charged, the greatest burden a state may impose upon a defendant is that of shouldering the burden of production." (Respondent's Brief, p. 5, 6)

The issue in the cited cases was not whether the burden of production could be shifted on an element of the crime; in the cited cases the respective affirmative defense did not shift the burden on an element. Instead, the respective affirmative defense offered the defendant an *excuse* to the crime charged, which happened to negate an element. Thus, the issue in the cited cases was the determination of whether the respective affirmative defense, which excused the crime (i.e., duress, necessity), allocated the burden of production or of persuasion *after* the state met its burden of production and of persuasion on the elements. Respondent's analysis is faulty because it equates the affirmative defenses in the cited cases, which offer the defendant an excuse to the crime and which have the collateral effect of negating an element, with the affirmative defense in the present case, which requires proof on the element itself. (See also Petitioner's Petition for Writ of Certiorari, p. 12, section III)

Contrary to Respondent's assertion, the adoption of Petitioners' argument will not invalidate all affirmative defenses. Respondent has misstated Petitioners' argument.[1]

II. THE AFFIRMATIVE DEFENSE IN QUESTION MANDATES THAT THE DEFENDANT CARRY THE BURDEN OF PRODUCTION ON AN ESSENTIAL ELEMENT OF THE CRIME, IT DOES NOT EXIST TO LIMIT THE STATUTE AND AID THE DEFENDANT.

Respondent incorrectly asserts that: "Rather than shift the burden of an element of the offense to the defendant, the affirmative defense aids the defendant by limiting the reach of the statute." (Respondent's brief, p. 8)

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[1] Respondent has also misstated Petitioners' observations concerning Ashcroft v. Free Speech Coalition, 535 U.S.___, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Respondent asserts that Petitioners misrepresented this Court's holding to this Court by "suggesting that this Court held that it was unconstitutional to include an affirmative defense in the federal child pornography statute." (Respondent's Brief, p.9) This is incorrect. Petitioners explicitly stated that the holding in that case was based on First Amendment grounds, and that the burden-shifting was a "concern" to this Court. (Petition, p. 8, n. 1) This Court wrote "the government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused [via its affirmative defense] to prove the speech is lawful." Expressing its concern, the Court stated "The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful...." 122 S.Ct. at 1404-05. While this Court did not issue its decision in that case based on the constitutionality of the burden-shifting affirmative defense, clearly this Court's concern about the burden-shifting is pertinent to the present case.

By making this new point, Respondent is ignoring the Minnesota Court of Appeals' construction of the statute. The statute, as construed by the Minnesota Court of Appeals, "imposes on defendants the burden of production regarding the age of the persons in the pornographic work [and] ...requires respondents to make a prima facie showing that the age of the persons involved is a disputed issue." State v. Myrland, 644 N.W.2d 847, 851 (Minn.Ct.App. 2002) (App. A-3, A-8).[2] Because the court of appeals squarely held that the statute shifts the burden of production to the defendant on an essential element of the crime, the only question for this Court is whether due process and the presumption of innocence allow for a defendant to be presumed guilty until the defendant presents the threshold amount of evidence necessary to make the required prima facie case, satisfy his burden of production, and avoid a directed verdict against him on that element.[3]

Finally, Respondent states that the state has the burden of proving, as part of its case in chief, that the subject depicted in the pornography is a minor. (Respondent's brief, p. 7) This obscures the issue. According to the court of

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[2] The court of appeals also confirmed that the age of the persons in the pornographic work is an essential element of the crime. 644 N.W.2d 847 at 851, (App. A-8).

[3] Respondent suggests that Petitioners' arguments below focused on the constitutionality of shifting the burden of persuasion. (Respondent's brief, p. 5) In fact, Petitioners argued extensively (to the district court, the court of appeals, and to the state supreme court in the petition for review) that the statute violates due process regardless of whether it shifts the burden of production or the burden of persuasion.

appeal's interpretation of the statute, the state will only have this burden of persuasion when and if the defendant first satisfies his burden of production showing that age is at issue. Again, the question for this Court is whether that is constitutional.

CONCLUSION

In view of the direct conflict of the decision below with past decisions of this Court, and because the decision below is contrary to the law in every jurisdiction of the United States, and is clearly erroneous, Petitioners respectfully request that their petition for a writ of certiorari to the Minnesota Court of Appeals be granted.

Respectfully submitted,

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